No. 12

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IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,
Respondent

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,
Appellant

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	4
Statement of Interest	4
Summary of Argument	8
Argument:	
Basic Principles Affecting Taxation of Income of Interstate Corporations	9
Solicitation of Business as a Taxable Local Activity	12
Local Activities of Respondent's Business Realistically Separable from Interstate Commerce	20
Conclusion	25

TABLE OF CITATIONS

Cases:

Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413 (1923)	9
Basso, Ratcliff & Gretton, Ltd. v. Tax Commission, 266 U. S. 271 (1924)	9
Braniff Airways, Inc. v. Nebraska State Board, 347 U. S. 590 (1954)	11

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147 (1918) 9

Commonwealth of Pennsylvania v. Eastman Kodak Company, 385 Pa. 607 (1956) 6

General Trading Company v. State Tax Commission of the State of Iowa, 322 U. S. 335 (1944) 12

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885) 21

International Shoe Company v. Washington, 326 U. S. 310 (1945) 13, 17

Joseph et al. v Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947) 20

McColdrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 10, 16, 17, 20

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 (1942) 9

Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948) 10, 22, 23

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 (1953) 21

Miller Brothers Company v. Maryland, 347 U. S. 340 (1954) 12

Nippert v. City of Richmond, 327 U. S. 416 (1946) 11, 16, 17

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937) 20

Railway Express Agency, Inc. v. Commonwealth of Virginia, 347 U. S. 359 (1953) 21

Robins v. Shelby County Taxing District, 120 U. S. 489 (1887) 15

Roy Stone Transfer Corporation v. Messner et al., 377 Pa. 234 (1954) 6

Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 (1951) 10

Underwood Typewriter Company v. Chamberlain, 254 U. S. 113 (1920) 11

U. S. Glue Co. v. Oak Creek, 247 U. S. 321 (1918) 9

West Publishing Company v. McColgan, 328 U. S. 823 (1946) 9, 10, 11, 18, 23

Western Livestock et al. v. Bureau of Revenue et al., 303 U. S. 250 (1938) 10, 11, 22

STATUTES:

Act of August 24, 1951, P. L. 1417, as reenacted and amended by the Act of December 27, 1951 (Corporation Income Tax Law) 4

Minnesota Statutes, s. 290.03 4

IN THE SUPREME COURT OF THE UNITED STATES

No. 12 October Term, 1958

State of Minnesota,

Respondent

v.

Northwestern States Portland Cement Company,

Appellant

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

This brief as amicus curiae is submitted by the Commonwealth of Pennsylvania, sponsored by the Attorney General, Thomas D. McBride, in accordance with the authority provided in Rule 42 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported at 250 Minn. 32, 84 N.W. 2d 373. For a copy of the said opinion, dissenting opinions and judgment (R. pp. 2-21 et seq.).

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on September 10, 1957 (R. 297, f. 3; R. 298, f. 1) following the decision of that court sustaining the validity of the tax in question. A timely petition for re-argument was filed by appellant on July 25, 1957 (R. 276, f. 280) and was denied by the Minnesota Supreme Court on August 28, 1957 (R. 297, f. 297). Notice of appeal was filed by appellant in the Supreme Court of Minnesota on September 12, 1957 (R. 298, f. 299).

Jurisdiction of the court is invoked under 28 U. S. Code, 1257 (2) and 2101 (c) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court violates the due process clause of the U. S. Const. Amend. XIV, s. 1 and commerce clause, U. S. Const. Art. 1, s. 8, cl. 3.

Probable jurisdiction was noted January 6, 1958 (R. 304, f. 309).

QUESTION PRESENTED

Does a state statute which involves a tax upon income derived from and fairly apportioned according to taxpayers' activities within the taxing state violate either the Commerce Clause or the Due Process Clause of the Federal Constitution when assessed against a foreign corporation engaged in interstate commerce, which corporation regularly and continuously engages in income-producing activities within the taxing state?

STATUTES INVOLVED

The tax in question was levied under Minnesota statutes, s. 290.03.

STATEMENT OF INTEREST

The Pennsylvania Corporation Income Tax Law of August 24, 1951, P. L. 1417, as reenacted and amended, 72 P.S. §3420n-1, imposes a property tax upon the net income of all corporations carrying on activities within the Commonwealth or owning property therein derived from sources within the Commonwealth in the following language:

> "§3420n-3. Imposition of tax
>
> "Every corporation carrying on activities in this Commonwealth or owning property in this Commonwealth by or in the name of itself or any person, partnership, joint-stock association or corporation shall be subject to and shall pay a State property tax on net income derived from sources within this Commonwealth at the rate of five per centum per annum upon each dollar of such net income received by and accruing to such corporation during the calendar years . . . ."
>
> "§3420n-2. Definitions
>
> . . . . . .
>
> " 'Sources within this Commonwealth' includes tangible or intangible property located or having

a situs in this Commonwealth, and any activities carried on in this Commonwealth, regardless of whether carried on in intrastate, interstate or foreign commerce.

"'Carrying on activities' shall include every act, power or privilege exercised or enjoyed in this Commonwealth as an incident to, or by virtue of, the powers and privileges acquired by the nature of the corporate organization."

The act provides a formula for the apportionment of income to the Commonwealth of Pennsylvania based upon the average of three fractions; the numerator of the first fraction is the value of the corporation's tangible property situated within the Commonwealth, and the denominator is the value of all the corporation's property wherever situated; the numerator of the second fraction is the expenditure of the corporation for wages, salaries, commissions, and other compensation to its employees assignable to the Commonwealth, and the denominator is the total expenditure of the corporation for wages, salaries, commissions and other compensation of all its employees; the numerator of the third fraction is the amount of the taxpayers' gross receipts from property and activities assignable to the Commonwealth, and the denominator is the amount of the taxpayers' gross receipts from all its property and activities.

The act defines "net income" of the corporation as income returned to and ascertained by the Federal government for Federal income tax purposes.

Thus it appears that the Pennsylvania statute imposes a tax on the income of corporations derived

from sources within the Commonwealth in essentially the identical language of the Minnesota statute under consideration in this case.

The Pennsylvania statute was considered by the Supreme Court of Pennsylvania in the cases of *Roy Stone Transfer Corporation v. Messner et al.*, 377 Pa. 234 (1954), and *Commonwealth of Pennsylvania v. Eastman Kodak Company*, 385 Pa. 607 (1956), cert. denied; 352 U. S. 952 (1956). In both said cases the Supreme Court of Pennsylvania concluded that the act as applied to the particular corporations involved violated the Commerce Clause of the Federal Constitution. The Supreme Court of Pennsylvania held that income derived from the use of locally situated property in income-producing activities is not subject to State taxation if the using corporation is engaged exclusively in interstate commerce, even though said property has a permanent legal situs in the taxing state. It held further that income derived from the solicitation of business by a corporation engaged in interstate commerce is never subject to state taxation regardless of the regularity and continuity of such solicitation, the extent and volume thereof, the number of persons engaged therein, and the volume of business produced thereby. The effect of the Pennsylvania Supreme Court's opinions is to immunize from State taxation the income of any corporation engaged in interstate commerce so long as any part of its activity within the taxing state involves the solicitation of interstate business.

The decisions of the Supreme Court of Pennsylvania in the above cases demonstrates the confusion that exists in the opinions of the courts and the un-

certainty and bewilderment of most judges in approaching the subject of taxable local activities in interstate commerce. It further demonstrates the insoluble problems confronting the executive, legislative and judicial department of every state, in connection with defining and enforcing a state fiscal system which will conform with the conflicting standards of the various decisions of the Supreme Court of the United States.

At the present time there are two cases pending before the Supreme Court of Pennsylvania involving the identical questions presented in the instant appeal. Argument of such cases has been continued by the Supreme Court of Pennsylvania until after the rendition of the appeal of your Honorable Court in the instant case.

It is submitted that there is a clear necessity for the enunciation of a precise definition of the terms "local activities in interstate commerce" or "local incidents of interstate commerce". Likewise the executive and legislative branches of the various state governments require a guide from your Honorable Courts, so that they may be informed regarding the validity of existing and proposed tax legislation. The resolution of these problems by your Honorable Court will end the confusion of the state courts on this subject and the present uncertainty as to the legality of state tax laws affecting interstate commerce.

SUMMARY OF ARGUMENT

I.

The Supreme Court of the United States has held that income derived from interstate commerce may be subjected to a state privilege or property tax so long as it is properly apportioned to activities within the taxing state; that income produced by local activities or the local ownership of property by corporations engaged exclusively in interstate commerce may be subject to state taxation.

II.

The regular, continuous and systematic solicitation of orders in a state by salesmen of a corporation engaged in interstate commerce, resulting in a continuous flow of the corporation's products into the state, constitutes the doing of business in the state sufficient to subject the income produced by such activities to state taxation.

III.

The only instances in which the Supreme Court of the United States has stricken down statutes imposing taxes upon corporations engaged in interstate commerce are where the sole activities of such corporations was the loading or delivery of property or passengers in interstate commerce. In all other cases taxes on corporations engaging in interstate commerce have been sustained so long as the tax was not imposed upon the privilege of engaging in interstate commerce. Where the incidence of the tax is not upon such privilege it conforms with constitutional requirements.

ARGUMENT

Basic Principles Affecting Taxation of Income of Interstate Corporations

The Commonwealth of Pennsylvania adopts the brief of the State of Minnesota, Respondent, and in addition thereto submits the following:

1. Income derived from interstate commerce may be subjected to state taxation so long as it is properly apportioned to activities within the taxing state. *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918); *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321 (1918); *Atlantic Coast Line R. Co. v. Doughton*, 262 U. S. 413 (1923); *Basso, Ratcliff & Gretton, Ltd. v. Tax Commission*, 266 U. S. 271 (1924).

2. Income produced by local activities or the local ownership of property by corporations engaged exclusively in interstate commerce may be subjected to state taxation. *West Publishing Company v. McColgan*, 328 U. S. 823 (1946); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649 (1942).

In the *West Publishing Company* case, the California Supreme Court defined the right of the state to tax such income in language which was approved by the Supreme Court of the United States. At 27 Cal. 705, at page 708, it is stated:

> "• • • plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in

interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. (citing cases) * * * A state 'may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden. United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, supra. * * * ' Such power is so well recognized that appeals questioning it are dismissed by the United States Supreme Court for want of a substantial federal question. Memphis Natural Gas Co. v. State Tax Comm., 323 U. S. 682, 65 S. Ct. 440; Id., Miss., 19 So. 2d 477; Parke, Davis & Co. v. Cook, 323 U. S. 681, 65 S. Ct. 436; Id., 198 Ga. 457, 31 S.E. 2d 728, 156 A.L.R. 1360."

3. The tax imposed in connection with local activities of corporations engaged in interstate commerce may be either a property or a privilege tax so long as it is not imposed upon the privilege of engaging in interstate commerce. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948) (franchise tax); *West Publishing Company v. McColgan*, supra (property tax); *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951); *McGoldrick, Comptroller of The City of New York v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940) (excise tax); *Western Live Stock et al. v. Bureau of Revenue et al.*, 303 U. S. 250 (1938) (privilege tax).

This entire matter was summarized by the Court in *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113 (1920), wherein Mr. Justice Brandeis said at page 119:

> "• • • Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

4. The presence of property within a state or the performance of other activities therein by a corporation engaged exclusively in interstate commerce, if carried on regularly and continuously amounts to the doing of a local business subjecting the corporation to local taxation. *Nippert v. City of Richmond*, 327 U. S. 416 (1946); *Braniff Airways, Inc. v. Nebraska State Board*, 347 U. S. 590, (1954); *Western Live Stock et al. v. Bureau of Revenue et al.*, supra.

The foregoing propositions made one principle crystal clear. A state tax on the income of a corporation derived from local activities in interstate commerce, if properly apportioned by means of allocation fractions which assign a fair proportion of the corporation's income to the taxing state does not burden interstate commerce.

This case does not involve any question with respect to due process, the fairness of the allocation fractions, multiple taxation or any other objection which would cause it to violate the Federal Constitution. It imposes a tax in practically the same language as that used in *West Publishing Company v. McColgan*, supra.

Solicitation of Business Taxable as a Local Activity

The decisions of the Supreme Court of the United States with respect to the taxability of solicitation of business in interstate commerce are confined to those cases where an attempt has been made to impose a tax upon the *privilege* of coming into a state irregularly and spasmodically for the purpose of soliciting interstate business. Therein, the Court has clearly distinguished that situation from the case where solicitation is so regular and continuous as to justify the conclusion that the solicitation is a permanent part of a continuing business. For example, where the only activity within the State of Iowa was the regular and continuous solicitation of orders by a salesman from a corporation's headquarters in Minnesota, which orders were taken subject to acceptance in Minnesota, it was held that a use tax with the requirement that the corporation collect the tax and pay it to the state did not violate the Federal Constitution. *General Trading Company v. State Tax Commission of the State of Iowa*, 322 U. S. 335 (1944).

In *Miller Brothers Company v. Maryland*, 347 U. S. 340 (1954), where the State of Maryland attempted to attach the motor vehicles of a corporation making deliveries within a state on purchases made in another state, Mr. Justice Jackson in denying the right of the State made the following significant statement at page 346:

> "The nearest support for Maryland's position is General Trading Co. v. State Tax Comm'n, 322

U. S. 335. * * * That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. * * *"

The fact that regular and continuous solicitation of business alone is sufficient to bring a corporation within a taxing state is further illustrated by the case of *International Shoe Company v. Washington*, 326 U. S. 310 (1945), wherein the question involved was the liability of a corporation, engaged only in the solicitation of interstate business in the State of Washington, for State Unemployment Compensation Taxes, and in proceedings in that State to recover Unemployment Compensation Tax payments. We quote from the opinion, at page 314:

"The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing

business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. International Harvester Co. v. Kentucky, 234 U. S. 579, 587; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 87; Frene v. Louisville Cement Co., 77 U. S. App. D. C. 129, 134 F. 2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce."

The statement of the Court at page 317 is most significant:

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. * * *"

Likewise, the statement at page 321:

> "* * * The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax. * * *"

Even in the leading case of *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), where the immunity of drummers to state taxation was enunciated, the Court clearly indicated that its conclusion applied only to drummers who came into a state for a temporary purpose, and not to those who were engaged in a regular and continuous course of business. Mr. Justice Bradley stated at page 493:

> "* * * But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; * * *"

An analysis of all the cases denying to the states the authority to impose a tax upon the solicitation of interstate business beginning with *Robbins v. Shelby County Taxing District*, supra, down to the present time discloses that each case dealt with a statute or ordinance imposing a license fee or a direct tax upon the privilege of soliciting business in interstate commerce. No case was concerned with the liability for state taxation of a corporation engaged in such activity where the tax was not upon the privilege of soliciting business or upon the privilege of engaging in the interstate commerce itself. These cases clearly illustrate that the facts in the present case do not establish a "drummer case".

The foregoing statement is confirmed by the language of Mr. Justice Stone in *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, supra, at page 55 where, in holding that delivery was a sufficient local activity to impose liability for a sales tax upon a corporation engaged in interstate commerce and making delivery in the state through a common carrier, he stated:

> "It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following Robbins v. Shelby County Taxing District, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. • • • *It is enough for present purposes that the rule of Robbins v. Shelby County Taxing District, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate,* compare Robbins v. Shelby County Taxing District, supra, with Ficklen v. Shelby County Taxing District, 145 U. S. 1; see Howe Machine Co. v. Gage, supra; Wagner v. Covington, supra; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case." (Emphasis supplied)

The case of *Nippert v. Richmond*, supra, completely answers any argument that this is a drummer case,

and is authority for the imposition of the tax upon this appellant. That case involved an ordinance of the City of Richmond requiring all solicitors, including persons soliciting business in interstate commerce, to obtain a license. The court went to great lengths to distinguish between *International Shoe Company v. Washington*, supra, and *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, supra, and pointed out that solicitation, when conducted regularly and continuously within a state so as to constitute a course of business, may be doing business just as is the making of delivery. The tax in the *Nippert* case was invalidated because of the fact that the appellee solicited in Richmond a total of only five days; that there was no showing that she intended to return later for the same purpose, and, if so, whether regularly and indefinitely, or only occasionally and spasmodically. The court concluded that continuous and regular solicitation of business within a state, which certainly is borne out by the facts herein, is such a local activity as to justify state taxation. This appellant could not deny that its solicitation and other activities in Minnesota are regular and continuous, and that it intends to carry on these same activities indefinitely in the future. The salaries paid, the value of the property employed, and the gross receipts and profits produced by these activities clearly indicate a substantial, continuous local income producing activity.

In the *Nippert* case the Court made the following significant statement at page 426:

> "* * * we put aside any suggestion that 'solicitation,' when conducted regularly and continuous-

ly within the State, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. * * *

"The sales and the deliveries in the Berwind-White case were regular, continuous and persistent. They constituted a 'course of business'. There was no suggestion, nor any basis in the facts for one, that they were only casual, spasmodic or irregular. * * * There was no showing that, apart from . . . five days, appellant had solicited previously in Richmond, that she intended to return later for the same purpose or, if so, whether regularly and indefinitely or only occasionally and spasmodically."

The Court further pointed out that the tax involved operated only upon out-of-state operators, and was, consequently, discriminatory, and had an exclusionary effect. It also stated that, since this was a municipal tax, the potentialities involved in the enactment of a similar tax by other municipalities within the state were obvious in their cumulative effect. Neither of these objections can be validly asserted here.

In the leading case of *West Publishing Company v. McColgan*, supra, which involved a California tax almost identical with the one under consideration, the major part of the activities conducted by the taxpayer in California was the solicitation of interstate business.

Neither the Minnesota tax nor the Pennsylvania Corporation Income Tax Act taxes the privilege of engag-

ing in interstate commerce, nor do they tax the privilege of performing specific activities hereinbefore enumerated. The tax is upon income produced by these activities in the state, and not elsewhere, income that is fairly apportioned to the state and which, under the Due Process Clause of the Constitution, cannot be taxed elsewhere.

Local Activities of Respondent's Business Realistically Separable from Interstate Commerce

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The appellant is a manufacturing corporation whose business is essentially intrastate. Its primary purpose is the manufacture of its products. Only in connection with the sale and distribution of its manufactured products does it engage in any interstate activity. This is the type of business the purpose and activity of which cannot be characterized as interstate commerce per se.

It is submitted that the only instances in which your Honorable Court has stricken down the taxation of corporations engaged in interstate commerce are where the sole activities of such corporation was the loading or delivery of property or passengers in interstate commerce.

In *Joseph et al. v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), it was held that loading and unloading were essential parts of the transportation itself. Loading and unloading were held to be the beginning and the end of interstate commerce and, therefore, inseparable therefrom.

In *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937), the Court held that interstate commerce ended with delivery so far as the transportation company was concerned and that such delivery was an inseparable and nonlocal incident of interstate commerce. However, in the *Berwind-White*,

case, supra, where a corporation not engaged in interstate transportation was involved it was held that delivery by it was a local incident of interstate commerce.

Likewise, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1953), the right of the State of Texas to impose a tax upon the occupation of taking gas for immediate interstate transportation by an interstate national gas pipe line company was in issue. The Court stated that the taking of gas into a pipe line was the entry of the gas into interstate commerce and involved the principle that taking and unloading by a transportation company are inseparable from the unbroken interstate process. The Court relied upon *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196 (1885), for the proposition that "receiving and landing passengers and freight is incident to their transportation", and concluded that transportation involved the unbroken process of interstate commerce.

At the same term the Court decided *Railway Express Agency, Incorporated v. Commonwealth of Virginia*, 347 U. S. 359 (1953), which involved a tax on express companies upon the gross receipts derived from interstate transportation of property. Mr. Justice Jackson stated at page 368:

> "• • • It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct.

508; Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396; New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 74 L. ed. 463, 50 S. Ct. 111."

On the other hand, the regular and continuous solicitation of business, the taking of orders, demonstration and delivery of products are incidents of sales in interstate commerce, but are not inseparable therefrom. The activities of salesmen within a state may give rise to an interstate shipment, loading and delivery, but are not a part of that process. Thus in *Memphis v. Stone*, supra, the maintenance of pipe lines was essential to the transportation of gas flowing through said lines in interstate commerce, but was, nevertheless, a local activity separate and distinct from said transportation.

The fact that interstate transportation and intercourse may be induced by local activities of appellant does not affect the right of the State with respect to taxation. This principle was enunciated in *Western Live Stock v. Bureau of Revenue*, supra, at page 253, where the Court stated: "Nor is taxation of a local business or occupation, which is separate and distinct from the transportation and intercouse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business".

Appellant's argument is based upon the assumption that if interstate commerce cannot be accomplished without the performance of the particular activity,

said activity is inseparable and an integral part thereof, and cannot be taxed. The error of this assumption is self-evident. In *Memphis Natural Gas Co. v. Stone*, supra, the transportation of gas through the State of Mississippi by pipe line could not have been accomplished without the maintenance of said pipe lines. The work done by the employees in Mississippi was essential to that transportation. Likewise, in the *Berwind-White* case, supra, the interstate sale of coal could not be completed without the delivery, which was the subject of the tax. Since delivery in the instant case is made by the vendor engaging in interstate commerce, even though it uses an interstate carrier to make such delivery, it is performing a local activity within Minnesota which, combined with other income producing activities in the state, subjects it to local taxation. In the *West Publishing Company* case, supra, the interstate sale and shipment of books could not have been accomplished without the solicitation of business in California. Nevertheless, these activities which made the interstate commerce possible were held to be of a local nature, and sufficient to justify state taxation.

The activities of appellant corporation constitute such a continuous and regular course of conduct as to combine to form a distinct and separate local activity within Minnesota. The Minnesota Tax as applied to appellant taxes income which is fairly and reasonably apportioned to the State by means of allocation fractions which have been carefully limited so as to make certain that only the income produced by such activities are taxed.

In the instant case the corporation has tangible property permanently situated in Minnesota. It has wages and pay roll in Minnesota payable to employees, some of whom reside therein permanently and devote their entire time to the corporation's activities in Minnesota, its salesmen take orders in Minnesota and it makes delivery of merchandise in that state. If the foregoing activities are not sufficient to bring respondent corporation within Minnesota's taxing power, then it is impossible to envision any situation wherein a state would have the right to tax a corporation engaged exclusively in interstate commerce.

CONCLUSION

It is respectfully submitted that the statute in question properly imposes a state tax upon corporations engaged in interstate commerce. The incidence of the tax is clearly upon income produced by local activities which are realistically separable from the corporation's interstate operation and which, because of their regularity and continuity, have been held to constitute the doing of business within the taxing state. The recognition of the right of the state to impose and collect such a tax from corporations regularly and continuously carrying on income-producing activities within a state, even though such activities are incident to interstate commerce, will finally resolve the present uncertainty and confusion of the state legislatures and courts on this subject.

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